



St. Thomas/St. John Division
3730 Altona
Suite 200
P.O. Box 6040
St. Thomas, VI 00804-6040
Tel (340) 774-8181
Fax (340) 774-3052

OFFICE OF THE TERRITORIAL PUBLIC DEFENDER

Government of the U.S. Virgin Islands



St. Croix Division
1-B Clifton Hill, 2nd Floor
P.O. Box 2635
Kingshill, St. Croix
U.S. Virgin Islands 00851-2635
Tel (340) 773-6312
Fax (340) 778-6823

April 2, 2025

Honorable Clifford A. Joseph, Sr.,
Chairman, Committee on Homeland Security,
Justice and Public Safety
Virgin Islands Legislature
3022 Estate Golden Rock
Christiansted, VI 00820

Via Email: senatorcliffordjoseph@legvi.org

Re: Testimony on Bill No. 36-0024

***Declaring a person incapable of consent to sexual relations
while the person is in police custody***

Dear Honorable Senator Joseph Sr.:

My name is Julie Smith Todman, and I am the Chief Territorial Public Defender for the Office of the Territorial Public Defender, which we call the "OTPD".

I begin by thanking the Chairman of the Committee on Homeland Security, Justice and Public Safety, Hon. Senator Clifford A. Joseph, Sr, for the invitation to testify on this matter. I also extend my gratitude to each of you in the listening and viewing audience, distinguished guests, and to the members and staff of the 36th Legislature.

The Office of the Territorial Public Defender was established by title 5, section 3520 of the Virgin Islands Code to represent the indigent charged with crimes in court. I was invited to provide my testimony concerning **Bill No. 36-0024, which is, *An Act amending title 14 Virgin Islands Code, chapter 85 by adding section 1710 declaring a person incapable of consent to sexual relations while the person is in police custody.***

Bill No. 36-0024, (or "Bill 24") was proposed by the ***Honorable Senator Ray Fonseca***. Bill 36-0024 adds section 1710. Section 1710 provides that:

(a) A person is incapable of consent to sexual relations when the person is detained, under arrest, or is otherwise in the custody of a police officer or other law enforcement official, and the offender is a police officer or other law enforcement official who either;

(1) Detained or arrested the person or is responsible for the person's custody; or

(2) Knows or should reasonably know that the person is under arrest or in custody

(b) The term "sexual relations" means sexual contact, sexual intercourse, or sodomy as defined in section 1699 of this chapter.

OTPD takes a neutral position on the overall goal of the legislation and limits its input to point out some possible ambiguities with the usage of 'custody' in the bill.

Taking up just a few lines, the proposed legislation is obviously very simple in word and in scope. One complicating notion is what it means to be "in the custody" of police or law enforcement. Because some special rights attach to persons "in custody," the phrase does get regular attention by the courts. For the same reasons, however, the phrase's usage may be complicated.

Because Bill 24 addresses the issue of consent in situations where a person is in police custody. Bill 24 focuses on important new distinctions that are more nuanced than those of "inmate" and would eliminate the ability of a person to consent to sexual relations when that person is "detained", "under arrest", or is "otherwise in the custody of a police officer or other law enforcement official who either placed the person in custody"; is responsible for the custody, or reasonably knows that the person is under arrest or in custody.

What does it mean to be "detained", or in "custody" and how does Bill 24 change current rights?

Bill 24 clarifies when a person loses the ability to consent to sex and broadens the circumstances under which consent is not legally recognized, including when someone is “detained” or “in custody”. In the United States Virgin Islands, the concept of being “in custody” , “custodial interrogation” or being “detained” by the police stems and flows from a case involving whether certain Miranda warnings were given before police questioning, whether the Miranda warnings are required or not was addressed in a case known as *Miranda v. Arizona*, which is why they are called “Miranda Warnings”

For example, this discussion is by the Supreme Court of the Virgin Islands setting forth the factors to be determined to define whether an individual is ‘in custody.’

A suspect is deemed to be “in custody” for *Miranda* purposes when the suspect has been deprived of freedom of action in any significant way. ... An inquiry regarding whether a person was held in custody often hinges on the totality of the circumstances. *Yarborough v. Alvarado* (holding that custody for *Miranda* purposes is determined by examining the totality of the circumstances surrounding interrogation and determining whether a reasonable person would have felt free to terminate the interrogation and leave). The United States Court of Appeals for the Third Circuit has enunciated five factors which we will also apply to this case to assess whether [the Defendant] was held in custody. *United States v. King*. These factors include: (1) whether an officer advised the defendant that he was under arrest or that the defendant was free to leave; (2) the location or physical surroundings of the interrogation; (3) the duration of the interrogation; (4) whether the officer used coercive tactics, including hostile tones in the officer's voice, display of a weapon, or conduct where the officer physically restrains the defendant's movement; and (5) whether the defendant voluntarily submitted to questioning from the officer. *Id.*¹

The five part custody test applied by the Third Circuit in *King* and

¹ *Ramirez v. People of the V.I.*, 56 V.I. 409, 419-20 (2012)(internal citations omitted)

quoted by our own Supreme Court above - is just one custodial test. Not to be outdone, the Eighth Circuit U.S. Circuit Court of Appeals has their own *six-part test*.² The important takeaway is that custody can mean more than one thing.

The central inquiry is whether, under the totality of the circumstances, a reasonable person in the suspect's position would feel "not free to leave" to a degree associated with a formal arrest. This standard, often referred to as the "reasonable person" standard, is fact-specific and considers factors such as the location, duration, and nature of the questioning, as well as the presence of coercive tactics or physical restraints.

The nature of this legislation raises other concerns. Would it apply in the case of a Defendant in his home but under curfew by the court? Or electronic monitoring? Would it apply to a law enforcement officer engaged in consensual sex involving restraints?

Here are example illustrations of the Standard under Miranda:

Scenario 1:

Custodial Detention Found During Pre-Arrest Interrogation at Home

Case: United States v. Williams, No. 3:21-cr-0005, 2023 U.S. Dist. LEXIS 108658 (D.V.I. June 23, 2023).

Scenario: On December 8, 2020, federal agents executed a search warrant at Ms. Williams's residence in the U.S. Virgin Islands as part of a gun and drug trafficking investigation. During the search, Williams was questioned by agents without being formally arrested. The interrogation took place in her home, but the court found that the circumstances—such as the presence of multiple armed agents, the execution of a search warrant, and the nature of the questioning—created a coercive environment.

Application of the Standard: The court applied the "reasonable person" standard, examining the totality of the circumstances, including: (1) the

² *United States v. Cowan*, 674 F.3d 947, 957 (8th Cir. 2012)(internal citations and quotations omitted)

location (home, but under law enforcement control), (2) the presence of coercive factors (armed agents and a search warrant), and (3) the lack of *Miranda* warnings prior to questioning.

The court suppressed Williams's statements, holding that she was in custody and entitled to *Miranda* warnings, as required by *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

This case demonstrates that even questioning in a non-law enforcement setting, such as a home, can be custodial if the environment is sufficiently coercive. Under Bill 24, in a case that had facts similar the person in custody would not be capable of consenting to sexual relations.

Scenario 2: Custodial Detention Not Found During Workplace Interview

Case: *United States v. Leese*, 176 F.3d 740 (3d Cir. 1999).

Scenario: Federal agents conducted an extended interview with a suspect at her workplace, within the Third Circuit's jurisdiction (including the U.S. Virgin Islands). The setting was a small room, but the suspect was neither restrained nor subjected to overtly coercive tactics, and the agents did not display weapons. The interview lasted more than an hour.

Application of Standard: The court applied the "reasonable person" standard, considering the totality of the circumstances:

1. The interview's location was non-coercive (a workplace).
2. The suspect was not physically restrained.
3. The agents conducted non-hostile, non-accusatory questioning.

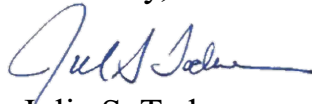
The court concluded that the suspect was not in custody and, therefore, *Miranda* warnings were unnecessary, in line with *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). This demonstrates that non-traditional interview settings, like workplaces, are typically not custodial unless there are clear coercive factors.

We don't know what standards Bill 24 proposes to apply. Does it propose similar standards to those that are used in Miranda to determine when a person is "in custody" and therefore cannot consent to sexual relations. Bill 24 in its brevity appears aimed to protect individuals under the control of the government and clarifies that certain sexual activity between those in custody and the law enforcement officials is non-consensual and is thus punishable under criminal law.

There is nothing that compels the Legislature to apply the same definition of 'custody', 'detention' or "under arrest" as utilized by the courts when resolving issues relating to custodial statements. However, there is some danger that without a discrete definition for these terms, the application of current standards could result in undesirable effects.

I thank the Committee for the invitation to testify on Bill 36-0024. I greatly appreciate your consideration of my remarks. This concludes my formal remarks. Thank you for your time and attention.

Sincerely,



Julie S. Todman
Chief Territorial Public Defender